The Iron Cage of Veneration

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The United States itself has now at least semi-officially been downgraded to the ranks of a “backsliding democracy” by International IDEA. So it seems appropriate that my response to this important letter by Andrew Arato and András Sajó refers to what I know best, that is, the United States and its constitutional order, rather than offer what would necessarily be even more speculative comments about other backsliding countries around the world. I do hope, though, that my comments, however parochial, do in fact pick up on the crucial questions identified by the two distinguished authors of an understandably heartfelt letter.

Limiting the Power of the Masses

I have been writing now for some years about what I regard as the “undemocratic” United States Constitution. As demonstrated by Harvard professor of law Michael Klarman in his tellingly titled *The Framers’ Coup,* the authors of the United States Constitution in 1787 were scarcely enamored of the new concepts of “democracy” being bandied about. As one delegate to the Philadelphia convention put it, the fledgling country was suffering from an “excess” of democracy, defined in part as an unwillingness of the masses simply to defer to the rule of socio-political elites. A central task of those who designed the Constitution was to limit the practical power of whatever counted as the mass public at the time. Much contemporary attention is deservedly placed on the compromises made with slaveowners and states that depended significantly on the enslavement of others, but at least as important politically, even if not morally, was what some call the “Great Compromise” by which each of the states was given equal voting power in the Senate. The Senate, whose members were appointed by state legislatures—an amendment in 1913 requires direct election– was in turn given an absolute veto power over any presumptively unwise legislation emanating from the House of Representatives.

Moreover, the president has the power to veto any legislation that manages to survive scrutiny by both the House and Senate—and, over the past 235 years, presidents have won their veto contests with Congress over 95% of the time, given that it takes a two-thirds vote of both the House and the Senate to surmount a veto. Presidents, of course, even today are formally elected not by the voters at large, but by the mechanism of the electoral college; two of the last four presidents got to the White House after losing the popular vote while gaining an electoral vote majority. Alexander Hamilton in *Federalist* 68 assured his readers that independent electors would protect the United States from ever having a demagogue as president. *That* assurance proved hollow with the rise of political parties and the loss of any genuine notion of “independent” electors.

All of these structural features of the United States Constitution continue to limit the “democratic” aspect of the Constitution, if by “democratic” one means both that

elections will reflect majority preferences and, in addition, the relative likelihood, as is often proclaimed, that “elections have consequences” will enable the winning political coalition in fact to translate its policy preferences into legislation. The difficulty of meeting these conditions would be present even if we did not have to add to the mix the possibility of negative “judicial review,” where a divided Supreme Court might invalidate legislation, on the basis of highly controversial readings of the Constituiton, that was passed by both houses of Congress and signed by the President.

Beyond Legalistic Limits

Arato and Sajó are not interested alone in what might be called “democratic” theory; they are also interested in attacks on the “rule of law” that are associated with “democratic backsliding.” But there is a complex relationship between the two. What if, after all, the “rule of law,” defined as adherence to procedural norms, works in systematic ways to frustrate democratic wishes and goals? It is one thing if the “rule of law” is thought to include a rich substantive basis that might include, say, “establishing justice” or “securing the blessings of liberty,” as stated in the Preamble to the United States Constitution. But one can also posit a completely formal notion of fidelity to law where, for example, one simply has to accept the inability to move closer to “justice” or “the blessings of liberty” because existing institutions entrench the power of those committed to a substantively unjust status quo. It took a catastrophic civil war that killed approximately 750,000 persons in order to rid the United States of slavery. Almost no one seriously believes that the institution would simply have been eliminated through the existing procedures of the Constitution of 1787 (and 1860).

So from my perspective, the most fundamental question that Arato and Sajó are asking is precisely how committed lawyers and constitutionalists should be to particular political systems that do not, at least on the surface, offer any grounds for optimism that the next election will “vote the rascals out of office” and enable forward movement to achieving the grand aspirations of a liberal constitutional order. As Bruce Ackerman has most notably argued, the Framers of the 1787 Constitution were more than willing to disregard the legal constraints foisted on them by the Articles of Confederation—America’s first constitution—that required that any amendments be ratified unanimously by the state legislatures of the thirteen existing states. Instead, as Article VII of the Philadelphia Constitution stipulated, the new regime would spring into legal life when ratified by the *conventions* (not the legislatures) of *nine* (not thirteen) states. James Madison fully defended this disregard of legalistic limits in *Federalist* 40. He condemned what he called a “rigid adherence” to “forms,” adherence to which would “render nominal and nugatory the transcendent and precious right of the people” to engage in genuine self-government.

One can see hints of recourse to the idea of the “constituent power” attached to the idea of “popular sovereignty.” Madison did not believe that power would be exercised by inchoate masses. Instead, he wrote, because “it is impossible for the people spontaneously and universally to move in concert towards their object; . . . it is therefore essential that such changes be instituted by some INFORMAL AND

UNAUTHORIZED PROPOSITIONS, made by some patriotic and respectable citizen or number of citizens." One may or may not be inspired by Madison's arguments. At the very least, they point to the tension between an uncomplicated notion of "rule of law" as adherence to existing "forms" and the duty of "patriotic and respectable citizens" to do whatever is thought necessary to move forward. If one is unsympathetic to such arguments, there might be temptation to cite Lenin or Carl Schmitt as de-facto "Madisonians." Presumably, most of us wish to avoid such comparisons.

One way of doing so is to take truly seriously Madison's evocation of "patriotic and respectable" citizens, especially if we combine this hope, articulated most fully in *Federalist* 10, that America will in fact be governed by virtuous leaders committed to attaining the public good rather than maximizing their own selfish interests (or those of an electoral "faction"). Full consideration of what one might well regard as Madison's fantasy (or delusion) would require an extensive discussion, far beyond the limits of this short comment, about *political culture* in all its dimensions. If leaders are chosen by ever-more-inclusive electorates, one has to explain why voters would in fact vote for virtuous elites instead of the champions of their own interests. On top of that, one had to explain why one should trust given elites in the first place, surely a central question of modern politics.

The Evil of Formal Institutional Structures

Although I am more than willing to bewail many aspects of contemporary American political culture and to suggest that the "backsliding" is a reflection of that culture, I also believe that one must understand as well the formal institutional structures that make it so difficult to have any optimism about American politics. Consider in this context that demographers predict that by 2040 70% of the entire American population will live in only fifteen states. (Today 50% of the population live in only ten states.) This means, of course, that 30% of the population will control 70% of the votes in a very powerful Senate. And there is nothing random about the distribution of the population. Less populated states tend to be older, more rural, more religious, and more racially homogeneous (i.e., white) than are the larger states. If one views much contemporary politics as a conflict between "parochials" and "cosmopolitans," then the United States Constitution gives an enormous edge to the former.

But can anything be done about the Senate—or the myriad of other features of the formal American system that I have written about in *Our Undemocratic Constitution*? Some of them—including the electoral college—might be subject to what Mark Tushnet has labeled clever "workarounds" that do not require formal amendment; it is, however, impossible to envision such a "workaround" with regard to the Senate. Article V, which makes the United States Constitution probably the most difficult-to-amend constitution in the world today, explicitly requires the equivalent of unanimous consent in order to change the equal distribution of voting power in the Senate. Madison, incidentally, was no fan of this feature of the Senate; he described it as an "evil," though a "lesser evil" to failing to agree on a new constitution at all. Perhaps he was right, given the politics of 1787, but he was also right that it was a true evil. That is more true today than at any time in the past. And even "regular"

amendment has become, as a practical matter, impossible, given the fact that even if a given amendment can get the assent of two-thirds of both the House and the Senate, it can still be blocked by the negative vote of only thirteen legislative houses in separate states. Inasmuch as needed structural changes might well be adverse to the interests of small states, they would almost certainly exercise their constitutionally granted veto powers.

So the United States may be a particularly drastic illustration of a general problem identified by Arato and Sajó, which is constitutional entrenchment itself. But in writing about Hungary, they are obviously referring to quite recent developments associated with the Orbán regime and the conscious attempts by Fidesz, which I assume that most readers of Verfassungsblog find malevolent, to ensure their retention of power regardless of future political developments. I often quote a statement that I first heard in the 1960s by the American political scientist John P. Roche: “Power corrupts, and the prospect of losing power corrupts absolutely.” I believe that captures an important truth and goes far to explain the politics of Orbán and of Fidesz and of many other authoritarians associated with democratic backsliding.

However, whatever else one thinks of Orbán and the constitutional “reforms” (or, more neutrally, changes) associated with Fidesz, few would assert that the current Hungarian constitution is “venerated” by Hungarians in general. Certainly its critics view it as a manifestation of raw, even brutal, political power. I suspect that even its admirers would be hard-pressed to defend it as reflecting what Hamilton referred to in *Federalist* I as the unimpaired product of “reflection and choice” by the totality of the Hungarian people.

What may be most truly “exceptional” about the United States, though, is its exaggerated “veneration” for its Constitution and its “Framers.” There is no prominent political figure today who is willing to suggest that the United States is in need of significant constitutional reform. Constitutional complacency reigns supreme.

So for me the most somber question is that asked by Arato and Sajó at the conclusion of their letter: “What to do (in light of constitutional theory)”–as another thinker asked, “What is to be Done?”—“if a consensual process of constitution making relying on all important actors turns out to be impossible?” The only honest answer I can give is, “I don’t know.” “Constitutional theory” does allow, after all, for the possibility of violent overthrow of an oppressive constitution, but this is scarcely a happy conclusion. Were American constitutional “discontents” merely the result of particular factors that could be relatively easily abated, whether that involved gaining control of social media or placing limits on the influence of money over politics, then one might confidently offer ameliorative programs and have some optimism about the future. But, in the United States, at least, optimism is hard to come by. Paradoxically or not, one might have more hope about Hungary, Poland, Chile, Brazil, or other countries unafflicted by “veneration” of a constitutional system that, left unreformed, serves as an iron cage, a “clear and present danger” to the actual achievement of liberal constitutional aspirations.